

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

HEALTHCOR HOLDINGS, INC.
HEALTHCOR, INC.
HEALTHCOR PHARMACY, INC.
HEALTHCOR REHABILITATION
SERVICES, INC.
CARENETWORK, INC.
PHYSICIANS HOME HEALTH
NETWORK, INC.
HEALTHCOR OXYGEN &
MEDICAL EQUIPMENT, INC.
PHHN, INC.

Debtors

Case No. 99-35332 RCM-11
Case No. 99-35333 RCM-11
Case No. 99-35334 RCM-11

Case No. 99-35335 RCM-11
Case No. 99-35336 RCM-11

Case No. 99-35337 RCM-11

Case No. 99-35338 RCM-11
Case No. 99-35339 RCM-11

Jointly Administered Under
Case No. 99-35332 RCM-11

WILLIAM F. HERZOG, LIQUIDATION
TRUSTEE FOR HEALTHCOR
LIQUIDATION TRUST

Plaintiff

VS.

Adversary No. 01-3685 ✓

BLUE CROSS BLUE SHIELD
OF TEXAS, INC.

Defendant

MEMORANDUM OPINION ON DEFENDANT'S
RULE 12(b)(1) MOTION TO DISMISS OR FOR ABSTENTION

U. S. BANKRUPTCY COURT NORTHERN DISTRICT OF TEXAS ENTERED JAN 31 2002 TAWANA C. MARSHALL, CLERK By _____ Deputy
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On January 22, 2002, came on to be heard the Rule 12(b)(1) motion of Blue Cross Blue

#22

Shield of Texas ("Blue Cross") to dismiss or for abstention in the above case, with William F. Herzog, Liquidation Trustee for HealthCor Liquidation Trust ("HealthCor") as Plaintiff, and Blue Cross as Defendant. The Court has non-core jurisdiction over this matter under 28 U.S.C. §§ 1334. The following are the undisputed facts and the Court's conclusions of law under Bankruptcy Rule 7052. This is an interlocutory, rather than a final, order.¹

Procedural Background

HealthCor and Blue Cross were parties to an arbitration proceeding. The arbitration panel rendered an award on October 18, 2001 (the "Award"). HealthCor filed its Original Complaint in this Court on November 2, 2001 seeking to confirm the Award under the Texas General Arbitration Act (the "TGAA"). On November 14, 2001, Blue Cross filed a state court action styled *Blue Cross Blue Shield of Texas v. HealthCor Liquidation Trust, et al.*, Cause No. GN 10374 in the 353rd Judicial District of Travis County, Texas (the "State Action"). The State Action sought *inter alia* to vacate or modify the Award.

On December 14, 2001, HealthCor timely removed the State Action to the United States District Court for the Western District of Texas, Austin Division. Blue Cross subsequently filed a Motion to Remand; however, United States District Court in Austin has not yet ruled upon the Motion to Remand.

Jurisdiction

This Court obtained jurisdiction over the controversy upon the filing of HealthCor's complaint. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.081-082 (Vernon 2002 Supp.). The TGAA expressly states that an applicant for a court order under its provisions, which necessarily includes

¹ See *Schuster v. Muns (In re Rupp & Bowman Co)*, 109 F.3d 237 (5th Cir. 1997).

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an application for an order confirming the arbitration award under § 171.087, may file the application “subject to this chapter, at or after the conclusion of the arbitration.” TEX. CIV. PRAC. & REM. CODE ANN. § 171.083 (Vernon 2002 Supp.). The TGAA does not specifically fix or otherwise restrict the time for filing a petition to confirm. Therefore, a plain reading of § 171.083 allowed HealthCor to seek confirmation of the Award at any time after the arbitration concluded.

First-Filed Court

Because HealthCor timely filed this adversary proceeding prior to Blue Cross’ filing of the State Action, this Court is the first-filed court. Although this Court can refuse to exercise its jurisdiction in favor of the second-filed court where there are factors of substance that support the exercise of the first-filed court’s discretion, *Columbia Pictures Industries, Inc. v. Schneider*, 435 F.Supp. 742, 747 (S.D.N.Y. 1977), this Court declines to cede its jurisdiction. HealthCor exercised its federal and state statutory rights in invoking this Court’s jurisdiction to confirm the Award. While it appears one deposition has been taken in the State Action, minimal discovery conducted in a second-filed lawsuit should not dispossess the first-filed court of its jurisdiction.

Mandatory Abstention

28 U.S.C. § 1334(e)(2) states in relevant part that

[u]pon timely motion of a party in a proceeding based upon a State law claim or State law cause of action . . . with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Currently, the case is pending before the United States District Court for the Western District of Texas. Even assuming that the Western District will remand the case to the state court in Travis County, Blue Cross has failed to present any evidence that the State Action can be timely

adjudicated. *Georgou v. Fritzshall (In re Georgou)*, 157 B.R. 847 (N.D. Ill. 1993); *Burgess v. Liberty Sav. Ass'n (In re Burgess)*, 51 B.R. 300 (Bankr. S.D. Ohio 1985). The Western District has not yet ruled on Blue Cross' Motion to Remand and Blue Cross did not present any evidence as to when that motion was set for hearing. Even after remand, if any, Blue Cross has failed to show that the case can or will be timely adjudicated. This Court, therefore, need not abstain from hearing this controversy under § 1334.

Additionally, some courts have found that a § 1334 (c)(2) motion is untimely when the state court action was brought after the filing of the bankruptcy action. *Williams v. Heller Fin., Inc.*, 82 B.R. 823 (E.D. La. 1988); *Borne v. New Orleans Health Care, Inc.*, 116 B.R. 487, 494 (E.D. La. 1990); see also *S.G. Phillips Constructors, Inc. v. City of Burlington, Vermont (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702 (2nd Cir. 1995) (§1334 (c)(2) requires abstention in "previously commenced" state court actions).

Conclusion

HealthCor was not premature in filing this adversary proceeding seeking to confirm the Award. This Court is the first-filed court and there are no compelling factors of substance that support ceding jurisdiction to the second-filed court. Finally, Blue Cross has not met its burden in showing why this Court should abstain from hearing this controversy under § 1334(c)(2). Thus, the Blue Cross motion to dismiss or abstain will be denied and the Court will retain its jurisdiction over this matter.

SO ORDERED, this 31 day of January, 2002.



Robert C. McGuire
United States Bankruptcy Judge

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